APPENDIX A-1

UNITED STATES OF AMERICA

Before the

National Labor Relations Board

Cases Nos. 12-CA-1021, 1022, 1023, 1025, 1026, 1027, 1028, 1060
Case No. 12-CA-1102

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.

and

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

WILLIE P. MAY

DECISION AND ORDER

On May 19, 1960, Trial Examiner Albert P. Wheatley issued his Intermediate Report in the above entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate

Report attached hereto. Thereafter, the Respondent and the General Counsel filed exceptions to the Intermediate Report, and supporting briefs.

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions, briefs and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent that they are consistent with the following decision and order.[1]

The Respondent is a common carrier and for years has carried on regular hauling operations by truck from and to the plants and mines of the Virginia-Carolina Chemical Corporation (herein called V-C). On May 22, 1959[2] the employees of V-C struck and formed a picket line at the entrance to the V-C premises. The strike lasted until August 1. As more fully described in the Intermediate Report, on June 2, the Respondent terminated seven of its drivers (Silvers, Spivey, V. Bennett, B. Bennett, J. Cooper, L. Cooper and Sewell), and on July 21, one driver (May) for refusing to carry out their assignments which required them to cross the picket line at V-C, although they remained on the job for the performance of all other work. Another driver, Krzanowski, when given the same assignment of June 24, left the job and went home. Upon his return to the plant on June 26, he was discharged on

[1] The Respondent's request for oral argument is denied as the record, including the briefs, adequately presents the issues and the positions of the parties.

[2] All dates hereafter are for the year 1959, unless otherwise specified.

the specific ground that he had left his work without notice to the Respondent.

The General Counsel relies in substance upon Section 502, of the Act which provides in part that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act." Specifically, the General Counsel takes the position that all 9 drivers, the complainants herein, refused to cross the V-C picket line because they believed in good faith that to accept such assignment would subject them to abnormally dangerous conditions in the course of their work. In these circumstances, the General Counsel contends, Section 502 provides protection to the 9 complainants, and their discharge therefore violated Section 8(a)(1) of the Act.

We need not decide whether, had there existed "abnormally dangerous conditions," Section 502 would afford affirmative protection to these complainants, for, upon careful consideration of all the pertinent evidence, we cannot conclude that the General Counsel has established the existence of such conditions.

It is necessary first to clarify the meaning of the term "abnormally dangerous conditions" as used in Section 502. We are of the opinion that the term contemplates, and is intended to ensure, an objective, as opposed to a subjective, test. What controls is not the state of mind of the employee or employees concerned, but whether the actual working

conditions shown to exist by competent evidence might in the circumstances reasonably be considered "abnormally dangerous."[3] In this light, we turn to the evidence relative to the specific complainants.

We can dispose of Krzanowski's case at the outset. On the basis found by the Trial Examiner, we are satisfied that his case is distinguishable from the others with respect to the Section 502 allegation. When this driver was given the assignment to the V-C premises on June 24, he abruptly left the job and went home. He returned to work on June 26, stating that he had been sick and his truck had not been operating properly. In the circumstances, we find that Krzanowski was justifiably discharged for the specific reason that he left his work for about two days without notice or explanation to the Respondent in violation of a company rule.

Seven of the drivers were discharged on June 2. The background circumstances were as follows. Prior to the strike at V-C, Respondent hauled in or out of V-C from 60 to 90 loads a day. From the inception of the strike on May 22 until June 2, the V-C facilities were virtually shut down. During this period, 13 loads in or out of V-C were hauled by 10 of Respondent's drivers, of whom 3 are complainants under discussion.[4] On June 1, V-C notified Respondent it would reopen on a full scale and Respondent thereupon undertook to resume its normal

[3] See, e.g., *N.L.R.B. v. Knight Morley Corp.*, 251 F. 2d 753, 756, 757 (C.A. 6) and *Knight Morley Corp.*, 116 NLRB 140, 145, 154; *Burke v. Mesta Machine Co.*, 79 F. Supp. 588, 611.

[4] Namely, B. Bennett, J. Cooper, L. Cooper.

trucking operations. (As of June 2, Rockana alone had a complement of about 50 drivers.)[5] On June 2, the 7 drivers in question, among others were assigned to the V-C premises.

As detailed in the Intermediate Report, the incidents occuring between May 22 and June 2, adduced to show the existence of "abnormal danger" which would affect these complainants in crossing the V-C picket line, consisted of the following. Shortly before the strike commenced, drivers Spivey and B. Bennett were told by certain V-C employees not to cross the picket line in the event of a strike as "somebody would get hurt." Driver Shirley was stopped at the picket line, and after reporting to the Respondent, was escorted across the picket line by a deputy sheriff. Driver Francouer was stopped at the picket line and threatened by pickets. He proceeded to a nearby grocery store to telephone Respondent for advice. A "good dozen" pickets followed him into the store and threatened him; as he left the store he was shoved, swung at, and finally kicked in the "rear end." Driver Sewell was approached by 8 to 10 men while he was eating supper in a diner and was told, "I hope you boys are not planning to go in because if you do we ain't going to promise you what will happen."

In the early morning of June 2, six of these drivers, excluding Sewell, after generally discussing the matter among themselves and others, refused the assignment to drive through the V-C picket line.

[5]The record does not disclose how many drivers were employed by Redwing as of June 2.

They were promptly discharged. Sewell reported for work in the afternoon, being aware of the six who had turned down the assignment that morning. Sewell made the same decision and was terminated.*

On July 21, driver May received the assignment, refused and was discharged. As to May, we rely upon these particular circumstances. He had previously decided, in agreement with the other drivers on the morning of June 2, to refuse any assignment to cross the V-C picket line. On June 27, a Florida State court issued an injunction which, *inter alia*, restrained 10 individuals from further participation in the picketing at V-C upon finding that they had committed acts of violence on the picket line. Following the injunction until the date of May's refusal on July 21, only one specific incident of violence (the acid throwing) occurred—and, this occurred away from the picket line.

As already indicated, we have considered the evidence as to each of the complainants herein in light of the objective facts existing at the time each made his decision to refuse the assignment. In reaching our conclusion on the factual issues posed, we have in addition given weight to the evidence showing that between June 2 and August 1, when the strike ended, Respondent hauled in or out of V-C about 1800 loads in the process of which over

*It was not established that Sewell was aware of certain additional incidents which occurred during the morning of June 2 in connection with a convoy of 8 trucks which Respondent initially arranged to go into the V-C premises. These incidents, which are not described in the Intermediate Report, consisted of attempted blocking and cutting off the road of Respondent's trucks, cursing, threatening, and throwing objects at drivers, strewing nails on the road, and the firing of a shot by an unidentified source.

50 Respondent's drivers crossed the V-C picket line about 3600 times.

The threats and acts of violence which have been shown in this case are not in issue as such and in no sense are condoned. Unfortunately, some disorder is not unusual in any extensive strike.[7] Other resources and forums appropriately exist to prevent and remedy such transgressions. Our functions, of course, is limited to the allegations of the specific violation of the Act raised in the General Counsel's complaint.

In view of the criteria and circumstances related above, and on the record considered as a whole, we conclude that the pertinent evidence does not warrant a finding that there existed "abnormally dangerous conditions" within the meaning of Section 502, when the complainants (except Krzanowski) refused to perform their assigned work.

We are left then with virtually the precise situation as was involved in the *Auto Parts* case.[8] There an employee refused in the course of his assigned duties to cross a picket line at the plant of another employer, while continuing on the job for the performance of his other work. It was held in effect that the activity of the employee was unprotected. As "simply stated" by the Board, the employee's "conduct was a refusal to do the job for which he had been hired and a direct disregard of his employer's instructions. For such conduct he could

[7] See *Republic Steel Corp. v. N.L.R.B.*, 107 F. 2d 472, 479 (C.A. 3), cert. den. 309 U. S. 684.

[8] *Auto Parts Co.*, 107 NLRB 242.

properly be discharged"[9] On the same legal basis, therefore, irrespective of whether their activity was concerted, we find that, in refusing the assignment to cross the V-C picket line, the 8 complainants (excepting Krzanowski) engaged in unprotected conduct.

We shall accordingly dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C. Mar. 6, 1961.

Boyd Leedom, Chairman

Philip Ray Rodgers, Member

John H. Fanning, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

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[9]For the principle that employees cannot insist on remaining at work on their own terms and conditions, or that partial or intermittent work stoppages are unprotected, see, e.g. *C. G. Conn Ltd. v. N.L.R.B.*, 108 F. 2d 390, 397 (C.A. 7); *N.L.R.B. v. Montgomery Ward & Co.*, 157 F. 2d 486, 496 (C.A. 8); *N.L.R.B. v. Kobler Co.*, 220 F. 2d 3, 10-12, (C.A. 7) enf'g 108 NLRB 207; *N.L.R.B. v. Rockaway News Supply Co.*, 197 F. 2d 111, 113, (C.A. 2), affirmed 345 U.S. 71.

UNITED STATES OF AMERICA

National Labor Relations Board

DIVISION OF TRIAL EXAMINERS

WASHINGTON, D. C.

Cases Nos. 12-CA-1021, 1022, 1023, 1025, 1026, 1027 1028, 1060

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TEAMSTERS, CHAUFFEURS AND HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

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WILLIE P. MAY

Joseph V. Morgan and *James L. Jeffers*, for the General Counsel of the National Labor Relations Board.

Wilson, Branch and Barwick of Atlanta, Ga., by *Alexander E. Wilson, Jr.*, for Redwing Carriers, Inc., and Rockana Carriers, Inc.

Before: *Albert P. Wheatley*, Trial Examiner.

INTERMEDIATE REPORT AND RECOMMENDATIONS—

Statement of the Case

This proceeding was heard before the undersigned Trial Examiner in Tampa, Florida, on March 14, 15, and 16, 1960. The issue litigated was whether Redwing Carriers, Inc. and Rockana Carriers, Inc. (herein referred to collectively as Respondent and separately as Redwing and Rockana, respectively) violated Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act). After the hearing the General Counsel and the Respondent filed briefs which the undersigned has considered.[1]

Upon the entire record and observations of witnesses the undersigned makes the following:

Findings and Conclusions

The Business of Respondent

Redwing and Rockana are separate Florida corporations located in Tampa, Florida, and are common carriers engaged in the hauling of liquid (petroleum) products and of dry freight (fertilizer, rock, etc.) products. During 1959 each corporation derived revenue in excess of $100,000 from hauling products outside the State of Florida or destined ultimately to points outside the State of Florida. For the purpose of this proceeding these corporations constitute a single employer within the mean-

[1] A document entitled "consent motion to correct the record" has also been filed and considered and is hereby granted.

ing of the Act and are referred to herein as Respondent. The evidence reveals that Respondent is engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act and that the Board's requirements for the assertion of jurisdiction have been established.[2]

The Alleged Unfair Labor Practices Issue

In the course of normal business Respondent has for a number of years carried on regular hauling operations from and to plants and mines of Virginia-Carolina Chemical Corporation (herein referred to as V-C) located near Tampa, Florida. On May 22, 1959, International Chemical Workers Union, Local No. 36, AFL-CIO, called a strike among employees of V-C and picket lines were established at the Florida facilities of that corporation. Between May 22 and June 2, 1959, the hauling operations normally performed by Respondent from and to these facilities of V-C were reduced to occasional trips (rather than regular runs in and out of the plants and mines). On June 2, 1959, Respondent endeavored to resume its normal hauling operations from and to the facilities of V-C. On this occasion and thereafter some of Respondent's truck drivers refused to accept assignments requiring them to cross the picket lines at the plants and facilities of V-C and Respondent terminated their employment because of such refusals. The issue herein is whether such terminations were violative of Section 8(a)(1) of the Act.

[2]Respondent concedes that the operations here involved are within the jurisdiction of this Agency.

The Facts

As noted above, a strike among employees of V-C and picketing at the facilities of V-C started on May 22, 1959. A few days before the beginning of this strike and picketing the employees of Respondent were advised of the pending nature thereof and were advised that crossing the picket lines might lead to trouble.

On May 27, 1959 Rockana employee Donald E. Shirley was stopped at a picket line at V-C's property by about 125 pickets gathered there shouting "scab and picket line breaker" and taking moving pictures and asked not to cross the picket line "until something was straightened out." Shirley then left the picket line site and reported this incident to Respondent. He was advised by Respondent to wait and that someone would meet and give him safe passage through the picket line. Shortly thereafter he was escorted through the picket line by a deputy sheriff.

On May 29, 1959, Rockana employee Andre Francoeur (also called Frenchy) approached the picket line at one of the facilities of V-C intending to make a pickup. As he did so the pickets (between 25 and 30) "strung themselves across the road," blocking his passage. When Francoeur stopped, the apparent leader of the pickets "jumped on the running board" of Francoeur's truck and told him "it would be more healthy if" he turned "around and did not make the pickup." Francoeur then left the picket line site and went to a grocery store "about a quarter of a mile down the road" and tele-

phoned Respondent, reporting what had happened. He was advised to stay where he was and that someone would be sent to help him.

When Francoeur left the picket line site about a dozen pickets followed him to the grocery store. After his telephone call to Respondent these pickets milled about him in a menacing manner—calling him "scavenger" and threatening to assault him and crowding him out of the store and toward his truck —until Francoeur started to leave the grocery store site. As Francoeur started to leave, a couple of the pickets kicked at him, one of them actually making contact with Francoeur's body. Upon leaving the grocery store site Francoeur was followed by the pickets for about 2 miles. Upon returning to Respondent's place of business Francoeur reported to Respondent and to his fellow employees what had happened.

On May 29, 1959, Rockana employee John T. Sewell was approached by 8 to 10 men, in a diner near the facilities of V-C and asked if he was the driver of the Rockana truck parked outside. When Sewell responded in the affirmative he was told "I hope you boys are not planning on going in [to V-C] because we are on strike and if you do we ain't going to promise you what will happen." Sewell replied "if that is the way it is I am not going in there" and was told "well that is the way it is." As Sewell left the diner, the men who had spoken to him stated "you boys be sure and watch your steps." The following day Sewell reported this incident to other drivers for Respondent (J. F. Cooper, Buie Bennett

and possibly to Melvin B. Spivey). Audrey Cribbs, another Rockana driver present in the diner, also testified with respect to this matter. His version of this incident varies from that given by Sewell in that he testified that the men suggested, without accompanying threats, that Respondent's employees not cross the picket line. On the basis of observation of witnesses and evaluation and the weighing of evidence the undersigned believes and finds that Sewell's version is more reliable than that given by Cribbs.

As noted above, on June 2, 1959, Respondent endeavored to resume normal hauling operations from and to the facilities of V-C. Accordingly, when its drivers reported for work on that date some of them found assignments directing them to these facilities. These drivers (and others) then conferred among themselves, discussing the assignments and the strike at the facilities involved. They anticipated that if they tried to cross the picket lines they would be placing themselves in danger of harm to themselves and damage to Respondent's equipment and decided not to cross the picket lines.[3] Supervisors for Respondent, including Respondent's president, Charles E. Mendez, were informed of this decision and the reasons therefore and these supervisors endeavored to persuade the drivers to go ahead and carry out their assignments, crossing the picket

[3]Respondent contends that the decision not to cross the picket lines was "individual" rather than "concerted" activity because the witnesses testified they made up their own minds not to cross the picket lines. In the light of the record this appears to be an "afterthought." In any event, any such contention is hereby rejected. It is clear from the record herein that the decision to refuse and the refusal, to cross the picket lines on June 2, 1959, was group or concerted activity and was treated as such by Respondent.

lines where necessary. Six drivers (William G. Silvers, Melvin B. Spivey, Vernon Bennett, Buie Bennett, James F. Cooper, and Lonnie Cooper) remained steadfast in their decision and were terminated. That afternoon when driver John T. Sewell reported for work he was given an assignment requiring him to cross the picket lines and he refused because of the anticipated bodily harm and his employment was terminated by Respondent.[4] There is a conflict of evidence herein as to whether Respondent's supervisors were informed that the drivers' decision not to cross the picket lines was because of their apprehension about harm to themselves or because they (the drivers) were averse to crossing any picket lines. As noted above, the undersigned finds that Respondent was informed that it was because of the aforementioned apprehension. In making these credibility resolutions the undersigned has considered the attitude, character and interest of each of the testifiers in the light of the situation as a whole as the evidence reveals it and inherent probability.

On Wednesday, June 24, 1959, Redwing driver William Krzanowski was given an assignment directing him to the facilities of V-C then being picketed. Upon receipt of this assignment Krzanowski remarked to Respondent's assistant dispatcher Feltz "Don't you know those boys are mean out there, they might hurt me" and then left Respondent's premises in his own automobile. Krzanowski did not report for work or call in on Thursday. On Friday, June 26, 1959, Redwing dispatcher James

[4]The duties of the terminated drivers were transferred to nonobjecting employees and thus Respondent maintained its operations.

R. Cunningham asked Krzanowski "What happen to you yesterday?" and Krzanowski replied that he was sick. Cunningham then indicated to Krzanowski that his services were being terminated and that he should turn in certain safety equipment issued to drivers when they are first employed by Respondent. Later that morning Krzanowski was told by Redwing's assistant dispatcher Feltz that he (Krzanowski) should have taken the assignment to the V-C's facilities and that someone else had taken it and Krzanowski replied he did not have to take it. Krzanowski testified that his decision not to cross the picket lines was his own decision and that he did not discuss whether or not he was going to cross the picket lines with anyone. There is no evidence herein that Krzanowski either before or after his termination acted in unison with other drivers for Respondent except for the fact that he did not cross the picket lines and the fact that he indicated that he anticipated physical harm if he attempted to do so. However, his refusal to cross the picket lines (unlike the refusal of the drivers on June 2) was not clearly stated to Respondent. At the time he left the dispatcher's office Respondent did not know whether he was going to perform his assignment or walk away without doing such. As noted above, he did the latter. Also, as noted above, it is not clear that Krzanowski's services were terminated for refusal to perform the assignment requiring him to cross the picket lines. From the record, one of two inferences appear applicable—that he was terminated for leaving his truck without notice or that he was terminated for refusing to cross the

picket lines. While the undersigned has some doubts about the matter, he believes (and finds) that the weight of the evidence establishes the former rather than the latter.

On June 2, 1959, Redwing driver Willie P. May conferred with other drivers for Respondent and agreed that he would not carry out any assignment requiring him to cross the picket lines at V-C. On July 21, 1959, May was given such an assignment but did not recognize it as such until after he had left Respondent's premises. While enroute to his destination (a location not familiar to him) it occurred to him that possibly he was being sent to a V-C facility. At that point May telephoned Respondent's assistant dispatcher Feltz and inquired whether he was being directed to V-C facilities. Upon receiving an affirmative reply he told Feltz that he was "afraid to go out there" and that he would return Respondent's truck at once, which he did. When he got back to Respondent's premises May told Redwing dispatcher Cunningham substantially the same thing he had told Feltz and was told that Respondent did not have something else for him. May made it clear that he was only refusing assignments requiring him to go to V-C facilities and that he would go anywhere else. May asked Cunningham whether he should turn in his equipment and was told to do as he pleased. He did turn it in. Respondent's answer herein admits that May was terminated on or about July 21, 1959, and in a letter to this Agency's Regional Director Respondent asserts May was dismissed for failure to carry out his assignment on July 21, 1959.

There is no evidence herein indicating antiunion animus or antipathy toward the employees for their concerted activity and, as noted above, the evidence reveals that the terminations were not impelled by such considerations, but by economic considerations.

Conclusions

The General Counsel asserts that the activities of the drivers herein were an exercise of rights guaranteed in Section 502 of the Act[5] and that this section of the Act limits the right of an employer to require continuance of work under what the employees in good faith believe to be abnormally dangerous conditions no matter how economic the employer's motivation may be. He relies primarily upon the doctrine announced in *Knight Morley Corporation.*[6]

It appears that Section 502 was inserted into the Act as a protection to those prevented from striking by virtue of no-strike clauses of contracts or by virtue by Section 8(d) of the Act (see *Knight Morley Corporation, supra*) and it is questionable whether it applies in situations such as is involved herein, where there is no collective bargaining contract in effect. Assuming, *arguendo*, it is applicable, it appears that the principle announced in the *Knight Morley* case would apply herein although

[5]Sec. 502 provides, "* * * nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

[6]See *N.L.R.B. v. Knight Morley Corporation*, 41 LRRM 2242, enforcing 116 NLRB 140.

there is a major factual difference other than the existence and nonexistence of a contract. In the *Knight Morley* case the conditions giving rise to the employee activities were of a fixed and continuing nature and were such that they created an actual constant threat to health. Here the conditions were sporadic and uncertain and it was speculative whether employees would be subjecting themselves to harm by going into the area. The language of Section 502 with reference to good faith suggests that employees are not required to wait until abnormally dangerous conditions are an actual constant and continuing threat and that they may act under a good faith belief that such conditions exist as well as when such conditions actually exist and the rationale of the *Knight Morley* case appears applicable in either situation. It is believed that the evidence adduced herein establishes a good faith belief which has not been overcome by evidence that abnormally dangerous conditions did not exist.[7]

Assuming, *arguendo,* that Section 502 is not aplicable, questions arise as to whether the drivers' activity here involved was concerted activity, whether it was concerted activity protected by the Act and, if these issues are answered in the affirmative, the problem involved is one of balancing the conflicting interests and rights and determining whether the employer's right to operate its business must give way to the employee's right to engage in concerted activities.[8]

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[7]See *Wichita Television Corporation*, 122 NLRB 222, 226.

[8]A problem which the Supreme Court noted but did not answer in *N.L.R.B. v. Rockaway News*, 345 U. S. 71.

As previously noted, except in the situation involving Krzanowski the undersigned believes and finds that the driver's activity here involved was concerted rather than individual activity. Section 7 of the Act recognizes a right of employees to work together for their mutual aid or protection. As noted in the dissenting opinion in the Rockaway News case, it is a time honored custom for employees to help one another by refraining from crossing picket lines. That is what the drivers herein were doing. Futhermore, they were seeking conditions of employment for themselves which did not require them to cross picket lines where violence prevailed —an activity intimately connected with their own immediate employment. In view of the foregoing, the undersigned believes, finds and concludes that the activity here involved was concerted activity protected by the Act. See *Washington Aluminum* Company, Inc., 126 NLRB No. 162

The problem now for determination may be stated: Must an economically motivated employer's right to operate its business give way to the concerted activities protected by the statute? The cases bearing upon this issue indicate that the answer is in the affirmative. The Board's rationale is set forth in *Cyril de Cardova & Bro.*, 91 NLRB 1121. See also dissenting opinion in *Rockaway News*, *supra*. In short, the authorities hold that an employer's desire to operate its business cannot serve as justification for infringing the rights which the Act guarantees to employees.

Redwing and Rockana are common carriers sub-

ject to the Interstate Commerce Commission and to the Florida Railroad and Public Utilities Commission and it may be argued that the duties imposed on these carriers required them (and through them the drivers) to cross the picket lines involved. It is not clear whether such duty is imposed. Assuming, however, that the carriers had an obligation to provide services under the conditions then prevailing it would seem that then restrictions similar to those imposed by no-strike clauses of contracts would be placed upon employees and that in that event it would be appropriate to apply Section 502 and the *Knight Morley* doctrine and thus effectuate the policy of Congress of not requiring continuance of work under what the employees in good faith believe to be abnormally dangerous conditions. If the duties imposed upon carriers by the aforementioned commissions requires carriers to cross picket lines where violence prevails and Section 502 does not apply, then an apparent conflict of requirements exists and in balancing this conflict (and the conflict of interests and rights previously noted) it appears appropriate to consider the intent of Congress as expressed in Section 502 and, in view thereof, to resolve the conflicts against the carriers.

In summary, the Act gives employees, acting in concert and in the face of abnormally dangerous conditions, a right to quit their labor without penalty (either in the face of a no-strike clause or where there is no such clause) in order to protect their health and their lives.

In view of the foregoing, the undersigned finds

and concludes that, except in the situation involving Krzanowski, the activity of the drivers herein in refusing to cross the picket lines at V-C was protected concerted activity and that their terminations were therefore unlawful.

As previously indicated, the undersigned concludes that the evidence adduced does not establish that Krzanowski was terminated in violation of the Act.

Ultimate Findings and Conclusions

In summary, the undersigned finds and concludes:

1. The evidence adduced in this proceeding satisfies the Board's requirements for the assertion of jurisdiction herein.

2. The evidence adduced establishes that Respondent, by interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

3. The aforesaid activities are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. The evidence adduced does not establish that Respondent violated the Act by terminating the services of William Krzanowski.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record

in this matter, the undersigned recommends that Redwing Carriers, Inc. and Rockana Carriers, Inc., their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act by discriminating in regard to their hire or tenure of employment or any term or condition of employment.

2. Take the following affirmative action which the undersigned finds will effectuate the policies of the Act:

(a) Offer to William G. Silvers, Melvin B. Spivey, Vernon Bennett, John T. Sewell, Buie Bennett, James F. Cooper, Lonnie Cooper and Willie P. May immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed;

(b) Make whole William G. Silvers, Melvin B. Spivey, Vernon Bennett, John T. Sewell, Buie Bennett, James F. Cooper, Lonnie Cooper and Willie P. May for any loss of pay they may have suffered by reason of the terminations of their employment;*

(c) Preserve and make available to the Board or to its agents, upon request, for examination or copying, all payroll records, time records, social security payment records, employees' income tax

*The loss of pay shall be computed in accordance with the customary formula of the National Labor Relations Board.

report records and all other records and reports necessary or useful to determine the amounts of monies due under the terms recommended in this Report;

(d) Post at its place of business in the vicinity of Tampa, Florida, copies of the notice attached hereto as Appendix A. Copies of such notice to be supplied by the National Labor Relations Board's Regional Director for the Twelfth Region, shall, upon being duly signed by a representative of Respondents, be posted upon receipt thereof and maintained for a period of sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other material;

(e) Notify the aforementioned Regional Director for the Twelfth Region, in writing, within twenty (20) days from the date of receipt of this Intermediate Report what steps Respondents have taken to comply with the recommendations herein made.

It is further recommended that the allegations of the complaint to the effect that Respondents unlawfully discharged William Krzanowski be dismissed.

It is further recommended that unless exceptions are filed in accordance with the rules and regulations of this Agency, the National Labor Relations Board adopts the findings, conclusions and recommendations herein contained, and issue an order requiring the foregoing recommended action.

Dated at Washington, D. C. this day of May 1960.

Albert P. Wheatley
Trial Examiner

/s/ ALBERT P. WHEATLEY

APPENDIX A-2

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases Nos. 12-CA-1021, 1022,
1023, 1025,
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REDWING CARRIERS, INC.
and
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TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

SUPPLEMENTAL DECISION AND ORDER

On March 6, 1961, the Board issued a Decision and Order in this case,[1] finding that Respondents had not engaged in unfair labor practices, and dismissing the complaint in its entirety. Thereafter, Teamsters, Chauffeurs & Helpers Local Union No. 79, et al., one of the Charging Parties, filed a petition with the United States Court of Appeals for the District of Columbia, requesting review of the Board's Order. A joint designation of record was

[1] 130 NLRB 1208.

filed with the court, as well as a brief by petitioner Local Union No. 79.

On February 5, 1962, the Board filed a motion with the aforesaid court, seeking to have the case remanded to the Board for further consideration. No objection was raised by Respondents, and, on February 21, 1962, the Board's motion was granted *per curiam* and the case remanded.

The Board has reconsidered its original decision, and hereby reaffirms that decision, except as modified herein.

The Board, in its original decision, found, *inter alia*, that certain employees of Respondents engaged in unprotected conduct when they chose in the course of their employment to honor a picket line at the premises of another employer. As set forth more fully in the original decision, these employees were permanently assigned to make deliveries to Virginia-Carolina Chemical Corporation. When they decided on June 2 not to cross the picket line established by Chemical Workers at Virginia-Carolina, their services were terminated by Respondents, who within a day or two replaced them with other drivers, including several new employees.[2]

In the earlier decision, the Board cited the *Auto Parts Co.*[3] case for the proposition that the activity of these employees, as described above, was unpro-

[2] One driver, though deciding with the group on June 2 not to cross the picket line, was not given a V-C assignment until July 21, at which point he refused and was told by Respondents they had "nothing else for him."

[3] *Robert H. Snow, d/b/a Auto Parts Co.*, 107 NLRB 242.

tected. A re-examination of that case indicates, however, that the Board there carefully avoided characterizing such activity as either protected or unprotected, but merely found that the employer did not violate Section 8(a)(3) by discharging its driver, Shuman, in the circumstances of that case.[4] Moreover, other Board cases on the same point have indicated to the contrary, namely, that employees engage in protected concerted activity when they respect a picket line established by other employees.[5] Such activity is literally for "mutual aid or protection," as well as to assist a labor organization, within the meaning of Section 7. Contrary to the language of the Board's former decision, therefore, we find that the employees of Redwing engaged in protected concerted activity when they refused to cross the Virginia-Carolina picket line.

Although the Act accordingly prohibits any reprisal against the eight Redwing drivers for engaging in the protected activity of not crossing the V-C picket line, we also recognize that the Respondents had a corresponding right which must be balanced against the right of the employees. That is,

[4]The Board in *Auto Parts* specifically found it "unnecessary to adopt the various rationales set out in the Intermediate Report." *Id.* at p. 242. The Trial Examiner had held expressly that employee Shuman had not engaged in a concerted activity for mutual aid or protection when he chose not to cross a picket line established by his union at another location.

[5]*Cyril de Cordova*, 91 NLRB 1121; *Cone Brothers Contracting Co.*, 135 NLRB No. 18. And see *Illinois Bell Telephone Co.*, 88 NLRB 1171, enf. den. 189 F. 2d 124 (C.A. 7), cert. den. 342 U.S. 885. See also *N.L.R.B. v. Peter Cailler Kohler Swiss Chocolates Co., Inc.*, 130 F. 2d 503, 505-506 (C.A. 2). A similar question was presented in *Rockaway News Supply Co., Inc.*, 95 NLRB 336, where the Board expressly held such activity a protected form of concerted activity. The Court of Appeals for the Second Circuit agreed with the Board on this point, but denied enforcement on another theory. 197 F. 2d 111. The Supreme Court affirmed the Second Circuit's conclusion, in effect on the grounds that the activity in question was itself in breach of an operative no-strike agreement. 345 U.S. 71.

Respondents had a right to attempt to run their business despite the sympathetic activities of the drivers here involved.[6] In this context, the Board has in the past drawn a distinction between replacement and discharge of such employees whose sympathies prevent them from performing assigned work tasks.

In considering the continued validity of the discharge-replacement distinction in this situation, we are convinced that substance, rather than form, should be controlling. That is, where it is clear from the record that the employer acted only to preserve efficient operation of his business,[7] and terminated the services of the employees only so it could immediately or within a short period thereafter replace them with others willing to perform the scheduled work, we can see no reason for reaching different results solely on the basis of the precise words, i.e., replacement or discharge, used by the employer, or the chronological order in which the employer terminated and replaced the employees in question.

This same point was made by both the Supreme Court and the Court of Appeals for the Second Circuit in *Rockaway News, supra*. The Board had there held that the employer could lawfully have required its employee to elect the status of a striker and replace him, but held in addition that the employer violated the Act by "discharging" him. The Second Circuit commented:

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[6]See, e.g., *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345.

[7]See, e.g., *Auto Parts Co., supra*, p. 242, ftn. 2.

> We cannot follow the Board's reasoning. . . . We think that the Board is wholly unrealistic in the distinction which it seeks to make between the discharge of Waugh for refusing to carry his newspapers across the picket line, which it stamps as unlawful, and the suggested replacement of him as a striker . . . , which it thinks would have been perfectly all right.[8]

The Supreme Court in its decision stated even more pointedly:

> The distinction between discharge and replacement in this context seems to us as unrealistic and unfounded in law as the Court of Appeals found it. This application of the distinction is not sanctioned by *N.L.R.B. v. Mackay Co.*, 304 U.S. 333,347. It is not based on any difference in effect upon the employee. And there is no finding that he was not replaced either by a new employee or by transfer of duties to some nonobjecting employee, as would appear necessary if the respondent were to maintain the operation. Substantive rights and duties in the field of labor-management do not depend on verbal ritual reminiscent of medieval real property law.[9]

We have reexamined the record in this case, and find it clear that, insofar as Respondents may actually have "discharged" the eight drivers, they did so entirely for the purpose of continuing their business operations. Redwing's president, Charles Mendez, testified that on June 2, when the drivers refused to cross the V-C picket line, he transferred other men from their normal jobs to make these

[8] *Supra*, 197 F. 2d at p. 115.
[9] *Supra*, 345 U.S. at p. 75.

deliveries, and in addition hired new men to replace them, both on June 2 and June 3. Dispatcher Pierola confirmed that he immediately called in other drivers from different runs to handle the V-C assignments, and several of the drivers themselves, including Bennett and Spivey, testified they were told by Mendez that he had no alternative but to replace them with other drivers. In view of the above, and the absence of any evidence of union animus on the part of Respondents, we are convinced that Respondents terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue their business dealings with V-C. Under these circumstances, and on these grounds alone, we reaffirm our original disposition of this case, and dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed.

Dated, Washington, D. C. JUL 20 1962

NATIONAL LABOR RELATIONS BOARD

(SEAL)

PHILIP RAY RODGERS and BOYD LEEDOM, MEMBERS, concurring:

For the reasons stated in the original Decision and Order in this case (130 NLRB 1208), we concur in the result.

Dated, Washington, D. C. JUL 20 1962

NATIONAL LABOR RELATIONS BOARD

APPENDIX A-3

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,415

TEAMSTERS, CHAUFFEURS & HELPERS LOCAL UNION NO. 79, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

REDWING CARRIERS, INC., and ROCKANA CARRIERS, INC.,

Intervenors.

On Petition to Review and Set Aside an Order and Supplemental Order of the National Labor Relations Board
Decided December 5, 1963

Mr. L. N. D. Wells, Jr., with whom *Mr. David Previant* was on the brief, for petitioner. *Mr. Hugh Hafer* also entered an appearance for petitioner.

Mr. Melvin Pollack, Attorney, National Labor Relations Board, with whom *Messrs. Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent.

Mr. Alexander E. Wilson, Jr., with whom *Mr. Robert T. Thompson* was on the brief, for intervenors.

Before DANAHER, BASTIAN and MCGOWAN, Circuit Judges.

BASTIAN, *Circuit Judge*: On June 10, 1961, The Teamsters, Chauffeurs & Helpers Local Union No. 79, petitioners, filed in this court a petition to review and set aside a decision and order of the National Labor Relations Board finding that Redwing Carriers, Inc. and Rockana Carriers, Inc. (hereinafter referred to as "the employers") had not engaged in unfair labor practices and dismissing the complaint in its entirety. After the filing of a brief by the union, the Board moved that the case be remanded to it for further consideration and, no objection having been filed, the case was so remanded.

In the original decision appealed from, the Board had found that certain employees of the employers had engaged in unprotected conduct when certain drivers refused to cross a picket line established by the Chemical Workers Union at the premises of Virginia-Carolina Chemical Corporation. These employees had been assigned to make deliveries to Virginia-Carolina but declined to cross the picket line, whereupon their services were terminated by the employers *and new employees were hired*. The Board held that the activity of the original employees was *unprotected*, and further found that the employers had not violated §8(a)(1) of the National Labor Relations Act by discharging those employees, and that "abnormally dangerous condi-

tions," within the meaning of §502 of the Act,[1] did not prevail when the employees refused to perform their assigned work.

On remand the Board, by a three to two majority, found that the employees had in fact engaged in *protected* concerted activity when they refused to cross the picket line, but held:

> "Although the Act, accordingly prohibits any reprisal against the eight Redwing drivers for engaging in the protected activity of not crossing the V-C picket line, we also recognize that the Respondents had a corresponding right which must be balanced against the right of the employees. That is, Respondents had a right to attempt to run their business despite the sympathetic activities of the drivers here involved."

The Board further held:

> "We have reexamined the record in this case, and find it clear that, insofar as Respondents may actually have 'discharged' the eight drivers, they did so entirely for the purpose of continuing their business operations."

The Board concluded:

> "In view of . . . the absence of any evidence of union animus on the part of Respondents, we are convinced that Respondents terminated the services of the eight drivers not in reprisal for honoring the V-C picket line, but solely to continue their business dealings with V-C. Under these circumstances, and on these grounds

[1] Labor Management Relations Act §502, 61 Stat. 162 (1947), 29 U.S.C. §143 (1958).

alone, we reaffirm our original disposition of this case, and dismiss the complaint in its entirety."

While the Board, in its original order, had found that no "abnormally dangerous conditions" existed, it did not do so *in haec verba* in its supplemental order. It did, however, adhere to its original decision except insofar as the conduct of the discharged employees had been held to be unprotected. All members of the Board concurred in the result, although two members adhered to the position taken by them on the original order.

We think it clear that there is adequate support in the record, considered as a whole, to support the findings of the Board and it follows accordingly, that the petition to set aside the order and supplemental order of the Board must be denied. Cf. *N.L.R.B. v. Rockaway News Supply Co.*, 197 F 2d 111 (2d Cir. 1952), *aff'd on other grounds*, 345 U.S. 71 (1953).

So ordered.

APPENDIX B

STATUTES INVOLVED:

Taft-Hartley; 29 U.S.C. §§151 ff

Section 2(3) of the Act provides: (29 U.S.C. 152(3))

> "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 2(9) of the Act provides: (29 U.S.C. 152(9))

> "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, re-

gardless of whether the disputants stand in the proximate relation of employer and employee."

Section 7 of the Act provides: (29 U.S.C. 157)

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

Section 8(a)(1) of the Act provides: 29 U.S.C. 158(a)(1)

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 8(b)(1) of the Act provides: 29 U.S.C. 158(b)(1)

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

Section 8(b)(4) of the Act provides, in part, as follows: 29 U.S.C. 158(b)(4)

"It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

"to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

"'(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

* * * * *

"Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act."

Section 13 of the Act provides: 29 U.S.C. 163

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 502 of the Act provides:

"Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."